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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

STEPHEN R. JOHNSON,

Defendant and Appellant.

D047679

(Super. Ct. No. SCE219872)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia K. Cookson, Judge. Affirmed in part and reversed in part.

Stephen R. Johnson appeals a judgment following a remand for a retrial on strike allegations. Johnson contends the court improperly considered evidence outside the records of his convictions, specifically, police reports, a probation report and a preliminary hearing. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

In the first trial, Johnson was convicted by a jury of assault with a deadly weapon involving the personal use of a deadly weapon (Pen. Code,¹ §§ 245, subd. (a)(1), 1192.7, subd. (c)(23)) and willful infliction of corporal injury on a cohabitant (§ 273.5, subd. (a)). The jury also found Johnson inflicted great bodily injury on the victim. (§ 12022.7, subd. (e)). In a bifurcated proceeding, the trial court found Johnson had two prison priors (§ 667.5, subd. (b)), two serious felony priors (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)(8)), and two strike convictions (§§ 667, subds. (b)-(i), 668, 1170.2).

In *People v. Johnson* (April 20, 2004, D042088 [nonpub, opn.]) we reversed the strike findings because the People failed to present sufficient evidence to prove Johnson had personally inflicted great bodily injury during the commission of his two prior convictions for battery with serious injury as required by section 1192.7, subdivision (c)(8).² We remanded for a retrial on the strike allegations but otherwise affirmed the judgment.

To prove Johnson had personally inflicted great bodily injury in one of the prior batteries, San Diego County Superior Court case No. ECR7455, the prosecutor introduced, among other things, Johnson's guilty plea in that case where he had stipulated

¹ All statutory references are to the Penal Code unless otherwise specified.

² We grant appellant's request to take judicial notice of the record in the first appeal (*People v. Johnson* (April 20, 2004, D042088 [nonpub, opn.])).

the police reports³ provided a factual basis for his plea, the police reports, and Johnson's statement in the probation report that the police reports were accurate.

To prove Johnson had personally inflicted great bodily injury in the other prior battery, San Diego County Superior Court case No. ECR10126, the prosecutor introduced, among other things, Johnson's guilty plea where he stipulated that the preliminary hearing provided a factual basis for his guilty plea and the preliminary hearing transcript, which included the victim's description of his injuries.

The trial court determined Johnson was the person who had suffered the two prior convictions and the offenses were serious felonies because he had personally inflicted great bodily injury. A jury was impaneled and returned verdicts finding both strike allegations were true.

The court sentenced Johnson to a term of 40 years to life.

DISCUSSION

I

Proof of Prior Serious Felony

Johnson's prior convictions were for battery with serious bodily injury under section 243, subdivision (d). For purposes of the three strikes law, prior convictions where the defendant *personally* inflicted great bodily injury qualify as strike convictions.

³ These reports were prepared by the San Diego County Sheriff's Department, but we refer to them as "police reports."

(§§ 667, subd. (b), 1192.7, subd. (c)(8).) The offense of battery with serious bodily injury does not require, as an element of the offense, that the defendant *personally* inflicted the great bodily injury.

California Law

The determination of whether a prior conviction qualifies as a serious felony under the three strikes law "is limited to an examination of the record of the prior criminal proceeding to determine the nature or basis of the crime of which the defendant was convicted." (*People v. McGee* (2006) 38 Cal.4th 682, 691; *People v. Trujillo* (2006) 40 Cal.4th 165, 179.) The rule limiting proof to the record of conviction means "the prosecution is not permitted to relitigate the circumstances of a past offense by introducing evidence outside the record." (*People v. Smith* (1988) 206 Cal.App.3d 340, 345, fn. 6.) Thus, for example, the prosecutor may not present live testimony outside the record of conviction. (*People v. Reed* (1996) 13 Cal.4th 217, 226.) This rule is fair because "it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial." (*People v. Guerrero* (1988) 44 Cal.3d 343, 355.)

The exact parameters of the record of conviction have not been completely defined. (See *People v. Whitney* (2005) 129 Cal.App.4th 1287, 1298.) It has been "technically" defined as including items that could have been used on appeal of the prior conviction. (*People v. Reed, supra*, 13 Cal.4th 217, 223; *People v. Trujillo, supra*, 40 Cal.4th 165, 177.) This definition has been stated to include any items that, pursuant to the California Rules of Court, would be considered a normal part of the record or by

which the appellate record could be augmented. (*People v. Abarca* (1991) 233 Cal.App.3d 1347, 1350; *People v. Scott* (2000) 85 Cal.App.4th 905, 913, fn. 11.) Alternatively, the phrase "record of conviction" has been defined "as referring only to those record documents reliably reflecting the facts of the offense for which the defendant was convicted." (*People v. Reed* at p. 223.) The record of conviction "also includes appellate court documents at least up to finality of the judgment." (*People v. Woodell* (1998) 17 Cal.4th 448, 455, italics omitted.) However, "[w]hether and to what extent an [appellate] opinion is probative in a specific case must be decided on the facts of that case." (*Id.* at p. 457.) Normal rules applying to the admissibility of hearsay evidence apply to evidence being admitted as part of the record of conviction to show the conduct underlying the conviction. (*Id.* at p. 458.)

In applying these definitions, the courts have held the record of conviction includes transcripts of the preliminary hearing and guilty plea but not post-guilty plea admissions made in a probation report. (*People v. Reed, supra*, 13 Cal.4th 217, 223-229; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1531; *People v. Abarca, supra*, 233 Cal.App.3d 1347, 1350; *People v. Houck* (1998) 66 Cal.App.4th 350, 355; *People v. Trujillo, supra*, 40 Cal.4th 165, 177.)

Impact of Recent United States Supreme Court Law

Johnson contends the recent United States Supreme Court case of *Shepard v. United States* (2005) 544 U.S. 13 (*Shepard*) implicitly overruled California Supreme Court precedent, and, as a constitutional matter, limits the evidence admissible to prove a prior conviction to facts the defendant actually or necessarily admitted when pleading

guilty in the prior case. Johnson argues that since he did not actually or necessarily admit he personally inflicted great bodily injury in the prior cases, the prosecution failed to prove they were strike convictions.

In *Shepard*, the Supreme Court interpreted the federal Armed Career Criminal Act (ACCA) (18 U.S.C., § 924(e)) and addressed whether at sentencing a court may look to police reports or complaint applications to determine the character of a burglary to which the defendant pleaded guilty it qualified the defendant for a minimum 15-year sentence under the act. The majority of the *Shepard* court concluded "a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." (*Shepard*, *supra*, at p. 16.)

Following the *Shepard* decision, the California Supreme Court in *People v. McGee*, *supra*, 38 Cal.4th 682, examined the *Shepard* decision and concluded the case did "not provide the type of clear resolution of the issue that would justify overturning the relevant California precedents" because "[t]he issue before the high court in *Shepard* was resolved as a matter of statutory interpretation, and the court did not purport to decide whether a state is constitutionally precluded from permitting a court to conduct the kind of examination of the record of a prior criminal proceeding that occurred in the case before us in determining whether a conviction constitutes a qualifying prior conviction for purposes of enhancement under a state sentencing statute." (*People v. McGee*, at p.

708.) The *McGee* court noted its interpretation was consistent with post-*Shepard* decisions by lower federal courts. (*Ibid.*)

In *People v. Gonzales* (2005) 131 Cal.App.4th 767, 775, the court, in rejecting the defendant's argument *Shepard* precluded use of the preliminary hearing transcript as part of the record of conviction to prove his prior conviction was a serious felony, stated:

"[W]e find *Shepard*'s holding unavailing for the reasons cited by respondent: (1) the *Shepard* Court was interpreting a federal statute, the interpretation of which is not binding on the interpretation of California law; [citation] (2) unlike the ACCA, California law specifically requires a defendant be afforded a trial on the issue of whether he has prior convictions [citation]; (3) unlike the ACCA, California law requires a jury trial to make findings regarding prior convictions that bring a defendant under the three strikes sentencing scheme [citation]; (4) the right to a jury trial and a finding beyond a reasonable doubt are rights already secured by California's process [citation]; and (5) *Shepard* did not address the use of a preliminary hearing transcript to prove a prior conviction." (*People v. Gonzales, supra*, at p. 775.)

Consideration of Factual Basis of Guilty Plea as Shown in Police Reports

Section 1192.5 requires that when the defendant pleads guilty under a plea bargain, the "court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea."

"[T]he court may develop the factual basis for the plea on the record through its own examination by having the defendant describe the conduct that gave rise to the charge [citation], or question the defendant regarding the factual basis described in the complaint or written plea agreement. (*People v. Holmes* (2004) 32 Cal.4th 432, 436 (*Holmes*).)

Alternatively, the court may ask defense counsel about the factual basis and if the court does this, the court "should request that defense counsel stipulate to a particular

document that provides an adequate factual basis, such as a complaint, *police report*, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement." (*Ibid*, italics added.)

"[T]he statutory mandate of section 1192.5 helps ensure that the 'constitutional standards of voluntariness and intelligence are met.' " (*Holmes, supra*, 32 Cal.4th at p. 438.) The factual basis requirement minimizes the chances of the defendant later successfully challenging his conviction, and provides the court " 'with a better assessment of defendant's competency, his willingness to plead guilty, and his understanding of the charges against him.' " (*Id.* at p. 438, fn. 2.) Additionally, conducting a factual basis inquiry before accepting a guilty plea "protect[s] against the entry of a plea by an innocent defendant." (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1183.)

Case No. ECR7455

Police Reports

Here, nothing in the record we have on appeal indicates the police reports were ever marked as exhibits or lodged with the court when Johnson pleaded guilty. Had they been, we would have little trouble finding they were part of the record of conviction given Johnson's stipulation that the police reports provided a factual basis, a stipulation that waived any hearsay or other evidentiary objections to the court's consideration of the police reports at the time he pleaded guilty. However, the police reports here were not marked or lodged with the court at the time of the plea and therefore are not part of the record of conviction. For the same reason it would not be proper for us to augment the record with the police reports. (See California Rules of Court, rule 8.155(a)(1)(A)),

allowing an appellate court to augment the record to include "[a]ny document filed or lodged in the case in superior court.")

We conclude the police reports were not part of the record of conviction and therefore could not provide substantial evidence to show Johnson personally inflicted great bodily injury.

Probation Report

The prosecutor also submitted a copy of the probation report to show the offense involved the personal infliction of serious injury. Specifically, the prosecutor relied on Johnson's statement in the probation report that the police report was accurate.

The California Supreme Court recently held in *People v. Trujillo*, *supra*, 40 Cal.4th 165 that a defendant's statements in a probation report may not constitute part of the record of conviction. In that case, after pleading guilty the defendant admitted to the probation officer he had used a knife in the offense. The Supreme Court, in rejecting an argument the defendant's statement in the probation report was part of the "record of conviction," stated:

"A statement by the defendant recounted in a postconviction probation officer's report does not necessarily reflect the nature of the crime of which the defendant was convicted. In the present case, for example, the prosecution did not attempt to prove that defendant used a knife and, instead, entered into a plea bargain in which it dismissed the allegation that defendant used a deadly or dangerous weapon and committed an assault with a deadly weapon. The prosecution could not have compelled defendant to testify, and thus could not have used defendant's subsequent admission that he stabbed the victim to convict him. Once the court accepted his plea, defendant could admit to the probation officer having stabbed the victim without fear of prosecution, because he was clothed with the protection of the double jeopardy clause from successive prosecution

for the same offense. [Citation.] Defendant's admission recounted in the probation officer's report, therefore, does not describe the nature of the crime of which he was convicted and cannot be used to prove that the prior conviction was for a serious felony." (*Trujillo, supra*, at p. 179.)

Here, Johnson's postconviction statement in the probation report that the police report was accurate is essentially the same as his statement at the time he pleaded guilty, that is, that the police reports reflected the nature of the crime to which he pleaded guilty and therefore do not present the same problem as presented to the *Trujillo* court.⁴ However, without the police reports — which are not included in the probation report — the statement is meaningless, that is, it does nothing to establish whether or not Johnson personally inflicted the great bodily injury.

In sum, the People once again failed to present substantial evidence to support a finding Johnson personally inflicted great bodily injury in case No. ECR7455.

Case No. ECR10126

Preliminary Hearing Transcript

To prove Johnson personally inflicted great bodily injury in case No. ECR10126, the prosecutor introduced a copy of the preliminary hearing transcript, which Johnson had stipulated provided a factual basis for his guilty plea. As we pointed out above, preliminary hearing transcripts have been held to constitute part of the record of

⁴ To the extent the Attorney General argues that as a broad rule a defendant's statements to a probation officer contained in a probation report are "adoptive admissions" (Evid. Code, § 1221) that are admissible and can be considered as part of the record of conviction, this argument was rejected by the Supreme Court in *Trujillo*.

conviction and this remains true even after the United States Supreme Court's decision in *Shepard*.

II

Double Jeopardy

Johnson contends the double jeopardy clauses of the federal and state constitutions barred retrial of the strike and serious felony allegations. He concedes, however, that both the United States and California supreme courts have rejected this argument (*Monge v. California* (1998) 524 U.S. 721; *People v. Monge* (1997) 16 Cal.4th 826), and that we are bound by those decisions (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

DISPOSITION

The judgment is reversed as to the true finding that the battery with serious injury in San Diego County Superior Court case No. ECR7455 was a prior strike conviction. The

trial court is instructed to amend the abstract of judgment and forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

I CONCUR:

BENKE, J.

I CONCUR IN THE RESULT:

HUFFMAN, J.